

## § 72.5

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prohibition of the Act, this part, parts 73, 74, 75, 76, 77, and 78 of this chapter.

(3) Issue orders, call witnesses, and compel the production of documents.

(b) The Administrator reserves the right under title IV of the Act to take any action necessary to protect the orderly and competitive functioning of the allowance system, including actions to prevent fraud and misrepresentation.

[58 FR 3650, Jan. 11, 1993, as amended at 60 FR 17113, Apr. 4, 1995]

### § 72.5 State authority.

Consistent with section 116 of the Act, the provisions of the Acid Rain Program shall not be construed in any manner to preclude any State from adopting and enforcing any other air quality requirement (including any continuous emissions monitoring) that is not less stringent than, and does not alter, any requirement applicable to an affected unit or affected source under the Acid Rain Program; *provided* that such State requirement, if articulated in an operating permit, is in a portion of the operating permit separate from the portion containing the Acid Rain Program requirements.

### § 72.6 Applicability.

(a) Each of the following units shall be an affected unit, and any source that includes such a unit shall be an affected source, subject to the requirements of the Acid Rain Program:

(1) A unit listed in table 1 of § 73.10(a) of this chapter.

(2) A unit that is listed in table 2 or 3 of § 73.10 of this chapter and any other existing utility unit, except a unit under paragraph (b) of this section.

(3) A utility unit, except a unit under paragraph (b) of this section, that:

(i) Is a new unit; or

(ii) Did not serve a generator with a nameplate capacity greater than 25 MWe on November 15, 1990 but serves such a generator after November 15, 1990.

(iii) Was a simple combustion turbine on November 15, 1990 but adds or uses auxiliary firing after November 15, 1990;

(iv) Was an exempt cogeneration facility under paragraph (b)(4) of this section but during any three calendar

year period after November 15, 1990 sold, to a utility power distribution system, an annual average of more than one-third of its potential electrical output capacity and more than 219,000 MWe-hrs electric output, on a gross basis;

(v) Was an exempt qualifying facility under paragraph (b)(5) of this section but, at any time after the later of November 15, 1990 or the date the facility commences commercial operation, fails to meet the definition of qualifying facility;

(vi) Was an exempt IPP under paragraph (b)(6) of this section but, at any time after the later of November 15, 1990 or the date the facility commences commercial operation, fails to meet the definition of independent power production facility; or

(vii) Was an exempt solid waste incinerator under paragraph (b)(7) of this section but during any three calendar year period after November 15, 1990 consumes 20 percent or more (on a Btu basis) fossil fuel.

(b) The following types of units are not affected units subject to the requirements of the Acid Rain Program:

(1) A simple combustion turbine that commenced commercial operation before November 15, 1990.

(2) Any unit that commenced commercial operation before November 15, 1990 and that did not, as of November 15, 1990, and does not currently, serve a generator with a nameplate capacity of greater than 25 MWe.

(3) Any unit that, during 1985, did not serve a generator that produced electricity for sale and that did not, as of November 15, 1990, and does not currently, serve a generator that produces electricity for sale.

(4) A cogeneration facility which:

(i) For a unit that commenced construction on or prior to November 15, 1990, was constructed for the purpose of supplying equal to or less than one-third its potential electrical output capacity or equal to or less than 219,000 MWe-hrs actual electric output on an annual basis to any utility power distribution system for sale (on a gross basis). If the purpose of construction is not known, the Administrator will presume that actual operation from 1985 through 1987 is consistent with such

purpose. However, if in any three calendar year period after November 15, 1990, such unit sells to a utility power distribution system an annual average of more than one-third of its potential electrical output capacity and more than 219,000 MWe-hrs actual electric output (on a gross basis), that unit shall be an affected unit, subject to the requirements of the Acid Rain Program; or

(ii) For units which commenced construction after November 15, 1990, supplies equal to or less than one-third its potential electrical output capacity or equal to or less than 219,000 MWe-hrs actual electric output on an annual basis to any utility power distribution system for sale (on a gross basis). However, if in any three calendar year period after November 15, 1990, such unit sells to a utility power distribution system an annual average of more than one-third of its potential electrical output capacity and more than 219,000 MWe-hrs actual electric output (on a gross basis), that unit shall be an affected unit, subject to the requirements of the Acid Rain Program.

(5) A qualifying facility that:

(i) Has, as of November 15, 1990, one or more qualifying power purchase commitments to sell at least 15 percent of its total planned net output capacity; and

(ii) Consists of one or more units designated by the owner or operator with total installed net output capacity not exceeding 130 percent of the total planned net output capacity. If the emissions rates of the units are not the same, the Administrator may exercise discretion to designate which units are exempt.

(6) An independent power production facility that:

(i) Has, as of November 15, 1990, one or more qualifying power purchase commitments to sell at least 15 percent of its total planned net output capacity; and

(ii) Consists of one or more units designated by the owner or operator with total installed net output capacity not exceeding 130 percent of its total planned net output capacity. If the emissions rates of the units are not the same, the Administrator may exercise

discretion to designate which units are exempt.

(7) A solid waste incinerator, if more than 80 percent (on a Btu basis) of the annual fuel consumed at such incinerator is other than fossil fuels. For solid waste incinerators which began operation before January 1, 1985, the average annual fuel consumption of non-fossil fuels for calendar years 1985 through 1987 must be greater than 80 percent for such an incinerator to be exempt. For solid waste incinerators which began operation after January 1, 1985, the average annual fuel consumption of non-fossil fuels for the first three years of operation must be greater than 80 percent for such an incinerator to be exempt. If, during any three calendar year period after November 15, 1990, such incinerator consumes 20 percent or more (on a Btu basis) fossil fuel, such incinerator will be an affected source under the Acid Rain Program.

(8) A non-utility unit.

(9) A unit for which an exemption under § 72.7 or § 72.8 is in effect. Although such a unit is not an affected unit, the unit shall be subject to the requirements of § 72.7 or § 72.8, as applicable to the exemption.

(c) A certifying official of an owner or operator of any unit may petition the Administrator for a determination of applicability under this section.

(1) *Petition Content.* The petition shall be in writing and include identification of the unit and relevant facts about the unit. In the petition, the certifying official shall certify, by his or her signature, the statement set forth at § 72.21(b)(2). Within 10 business days of receipt of any written determination by the Administrator covering the unit, the certifying official shall provide each owner or operator of the unit, facility, or source with a copy of the petition and a copy of the Administrator's response.

(2) *Timing.* The petition may be submitted to the Administrator at any time but, if possible, should be submitted prior to the issuance (including renewal) of a Phase II Acid Rain permit for the unit.

(3) *Submission.* All submittals under this section shall be made by the certifying official to the Director, Acid

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Rain Division, (6204J), 1200 Pennsylvania Ave., NW., Washington, DC 20460.

(4) *Response.* The Administrator will issue a written response based upon the factual submittal meeting the requirements of paragraph (c)(1) of this section.

(5) *Administrative appeals.* The Administrator's determination of applicability is a decision appealable under 40 CFR part 78 of this chapter.

(6) *Effect of determination.* The Administrator's determination of applicability shall be binding upon the permitting authority, unless the petition is found to have contained significant errors or omissions.

[58 FR 3650, Jan. 11, 1993, as amended at 58 FR 15648, Mar. 23, 1993; 62 FR 55475, Oct. 24, 1997; 64 FR 28588, May 26, 1999; 66 FR 12978, Mar. 1, 2001]

### § 72.7 New units exemption.

(a) *Applicability.* This section applies to any new utility unit that has not previously lost an exemption under paragraph (f)(4) of this section and that, in each year starting with the first year for which the unit is to be exempt under this section:

(1) Serves during the entire year (except for any period before the unit commenced commercial operation) one or more generators with total nameplate capacity of 25 MWe or less;

(2) Burns fuel that does not include any coal or coal-derived fuel (except coal-derived gaseous fuel with a total sulfur content no greater than natural gas); and

(3) Burns gaseous fuel with an annual average sulfur content of 0.05 percent or less by weight (as determined under paragraph (d) of this section) and non-gaseous fuel with an annual average sulfur content of 0.05 percent or less by weight (as determined under paragraph (d) of this section).

(b)(1) Any new utility unit that meets the requirements of paragraph (a) of this section and that is not allocated any allowances under subpart B of part 73 of this chapter shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, and §§ 72.10 through 72.13.

(2) The exemption under paragraph (b)(1) of this section shall be effective

on January 1 of the first full calendar year for which the unit meets the requirements of paragraph (a) of this section. By December 31 of the first year for which the unit is to be exempt under this section, a statement signed by the designated representative (authorized in accordance with subpart B of this part) or, if no designated representative has been authorized, a certifying official of each owner of the unit shall be submitted to permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit. If the Administrator is not the permitting authority, a copy of the statement shall be submitted to the Administrator. The statement, which shall be in a format prescribed by the Administrator, shall identify the unit, state the nameplate capacity of each generator served by the unit and the fuels currently burned or expected to be burned by the unit and their sulfur content by weight, and state that the owners and operators of the unit will comply with paragraph (f) of this section.

(3) After receipt of the statement under paragraph (b)(2) of this section, the permitting authority shall amend under § 72.83 the operating permit covering the source at which the unit is located, if the source has such a permit, to add the provisions and requirements of the exemption under paragraphs (a), (b)(1), (d), and (f) of this section.

(c)(1) Any new utility unit that meets the requirements of paragraph (a) of this section and that is allocated one or more allowances under subpart B of part 73 of this chapter shall be exempt from the Acid Rain Program, except for the provisions of this section, §§ 72.2 through 72.6, and §§ 72.10 through 72.13, if each of the following requirements are met:

(i) The designated representative (authorized in accordance with subpart B of this part) or, if no designated representative has been authorized, a certifying official of each owner of the unit submits to the permitting authority otherwise responsible for administering a Phase II Acid Rain permit for the unit a statement (in a format prescribed by the Administrator) that: